

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LAWRENCE HARTFORD, DOUGLAS
MITCHELL; BRETT BASS; SPORTING
SYSTEMS VANCOUVER, INC.; SECOND
AMENDMENT FOUNDATION, INC.; AND
FIREARMS POLICY COALITION, INC.,

Plaintiffs,

vs.

BOB FERGUSON, in his official capacity as
Washington State Attorney General; et al.

Defendants.

NO. 3:23-cv-05364-RJB

SNOHOMISH COUNTY DEFENDANTS
FORTNEY AND CUMMINGS' REPLY IN
SUPPORT OF THEIR MOTION TO
DISMISS PLAINTIFFS' 42 U.S.C. §1983
AND 42 U.S.C. §1988 CLAIMS AND
DAMAGES

NOTE ON MOTION CALENDAR:
June 16, 2023

I. REPLY

Plaintiffs challenge the constitutionality of SHB 1240 pursuant to 28 U.S.C. §§1651, 2201, and 2202, and 42 U.S.C. §1983 and §1988, as well as *Ex parte Young*, 209 U.S. 123 (1908). Dkt. 1, ¶8.¹ However, Plaintiffs' Complaint fails to allege any facts to suggest Defendants Fortney or Cummings ("Snohomish County Defendants"), either personally or

¹ See also Dkt. 1, pg 18, Cause of Action, A. and ¶88 (citing to 42 U.S.C. §1983). Despite these references in the complaint, Plaintiffs state they are not seeking damages under 42 U.S.C. §1983.

1 through their roles as Snohomish County officials, engaged in a Second Amendment violation.
 2 Because these facts are necessary in any cause of action brought under 42 U.S.C. §1983, the
 3 Court should grant Snohomish County Defendants’ motion to dismiss claims for relief under 42
 4 U.S.C. §1983 and §1988 with prejudice.²

5 **A. Plaintiffs have failed to sufficiently plead any cause of action under 42**
 6 **U.S.C. §1983 against the Snohomish County Defendants; the Court should**
 7 **therefore dismiss such claims.**

8 “Official capacity” lawsuits under 42 U.S.C §1983 (“§1983”) must include allegations
 9 sufficient to support a *Monell* claim. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166 (1985)
 10 (“Thus, in an official-capacity suit the entity’s ‘policy or custom’ must have played a part in the
 11 violation of federal law.”). The requirement to satisfy *Monell* applies to actions under §1983
 12 whether the actions are for damages or prospective relief. *Los Angeles County v. Humphries*,
 13 562 U.S. 29, 39 (2010) (holding “that *Monell*’s ‘policy or custom’ requirement applies in §
 14 1983 cases irrespective of whether the relief sought is monetary or prospective.”). Plaintiffs
 15 concede that they “have not pleaded a claim under *Monell*.” Dkt. 53, at 5. This concession is
 16 fatal to Plaintiffs’ “official capacity” §1983 cause of action against Snohomish County
 17 Defendants and it must be dismissed.
 18

19 In the absence of *Monell* allegations, Plaintiffs argue they can still proceed against
 20 Snohomish County Defendants under 42 U.S.C. §1983 because those officers have a duty to
 21 enforce state law and are therefore “representatives of the *state*.” Dkt. 53, at 5. Plaintiffs rely on
 22 *Mitchell v. Atkins*, 387 F. Supp. 3d 1193, 1195 (W.D. Wash. 2019), to claim that county sheriffs
 23
 24

25 _____
 26 ² From Plaintiffs’ Response, it appears they misunderstand Defendants’ Motion, in part.
 27 Defendants’ Motion seeks dismissal of all claims for relief under 42 U.S.C. §1983 and §1988.
 The Motion does not address Plaintiffs’ *Ex parte Young* or other claims.

1 and prosecutors have a “direct duty” to enforce state law. Dkt. 53, at 5-6. *Mitchell* is
 2 distinguishable. In *Mitchell*, plaintiffs sought declaratory relief challenging amendments to
 3 Washington’s gun control laws as unconstitutional, particularly a prohibition on sales to
 4 individuals under the age of 21. *Id.* at 1195. The suit was brought against the county sheriff and
 5 city police chief in their official capacities. *Id.*³ Under the statute, a dealer could not deliver a
 6 pistol or semiautomatic assault rifle to a purchaser until the dealer delivered the purchaser’s
 7 application to the local police chief or sheriff and waited for a response. *Id.* at 1200. The police
 8 chief or sheriff was required to deny the application if the purchaser was ineligible. *Id.* Thus, in
 9 *Mitchell* the sheriff or police chief had a “direct duty” to enforce the restrictions. *Id.* at 1200.⁴

11 In contrast, SHB 1240 does not dictate or direct a county sheriff or prosecutor’s actions.
 12 Instead, enforcement of SHB 1240 falls within the county sheriff and prosecutor’s broad
 13 discretion to determine the proper method and mechanism to enforce the law. How to enforce
 14 state law is “fundamental” to the office of sheriff, and it allows for significant discretion in
 15 deciding “how, when, and against whom to enforce the law.” *Matter of Recall of Snaza*, 197
 16 Wn.2d 104, 112-14, 480 P.3d 404 (2021). Similarly, an elected prosecutor has no “duty” to
 17 prosecute any particular crime. *State v. Rice*, 174 Wn.2d 884, 905, 279 P.3d 849 (2012). “The
 18 very concept of a locally elected ‘prosecuting attorney’ includes the core function of exercising
 19 broad charging discretion on behalf of the local community,” and the state legislature cannot
 20 interfere with that core function. *Id.*

24 ³ In *Mitchell*, the court granted the County defendant’s motion to dismiss the 42 U.S.C. §1983
 25 claims against them.

26 ⁴ Plaintiffs’ reliance on *Buffin v. California*, 23 F.4th 951 (9th Cir. 2022) is also misplaced as the
 27 sheriff in *Buffin* lacked discretion as it was “charged by state law with enforcing a state-
 mandated bail regime.” *Id.* at 962.

1 In the absence of any specific statutory duty, Plaintiffs’ 42 U.S.C. §1983 claim appears
 2 to rely on a general allegation regarding the duty to enforce state law. “[A] generalized duty to
 3 enforce state law,” however, does not subject a government official to §1983 liability. *Los*
 4 *Angeles Cty. Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *see also Mitchell v. Atkins*, 387
 5 F. Supp. 3d 1193, 1201 (W.D. Wash. 2019) (law enforcement entities’ general obligation to
 6 apply the criminal code cannot make them liable in a §1983 action); *Surplus Store & Exch., Inc.*
 7 *v. City of Delphi*, 928 F.2d 788, 791–92 (7th Cir. 1991) (a policy of enforcing state law is not
 8 sufficient to ground liability against a municipality). Plaintiffs’ §1983 allegations are
 9 generalized and, therefore, must be dismissed.
 10

11 Additionally, while a county prosecutor may act as a state official *when performing the*
 12 *function* of criminal prosecutor, Plaintiffs do not allege that the Snohomish County prosecutor is
 13 engaging in this function here. *See Whatcom Cty. v. State*, 99 Wn. App. 237, 250, 993 P.2d 273
 14 (2000) (county prosecutor is a “state official” when performing the function of criminal
 15 prosecutor). The determination regarding whether an official’s action falls within a county or
 16 state function is a fact specific inquiry that requires the court to review the official’s alleged
 17 action and state law. *See id.* at 243-46 (employing a two-part test to determine whether the
 18 County official was entitled to indemnification by the state); *McMillian v. Monroe County, Ala.*,
 19 520 U.S. 781, 784-87, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997) (to determine whether an official is
 20 acting for the state, county, or city the court must examine the function the official is
 21 performing, and then define the official’s functions under state law). The Complaint in this case,
 22 however, lacks any factual allegations related to Snohomish County Defendants’ performance
 23
 24
 25
 26
 27

1 or conduct. Accordingly, there is no basis to find that the County Defendants have taken any
 2 action – much less acted in a representative capacity.

3 Plaintiffs’ theory of liability is based solely on the existence of Snohomish County
 4 Defendants’ generalized ability to enforce state law. The Court should dismiss Plaintiffs’ §1983
 5 claim against Snohomish County Defendants.

6
 7 **B. Plaintiffs are not entitled to attorney’s fees and costs under 42 U.S.C. §1988
 because their §1983 claim fails as a matter of law.**

8 Curiously, despite claiming they are not seeking damages under 42 U.S.C. §1983,
 9 Plaintiffs assert they are entitled to attorney fees under 42 U.S.C. §1988. Under §1988, a court,
 10 in its discretion, may award “a reasonable attorney’s fee” to “the prevailing party” in suits
 11 brought under §1983, and certain other statutes which are not applicable here. Because
 12 Plaintiffs have failed to articulate a cause of action under §1983 against the Snohomish County
 13 Defendants, they are not entitled to an award of attorney’s fees under §1988.

14
 15 **II. CONCLUSION**

16 Plaintiffs concede they are not bringing a *Monell* claim and have not alleged any personal
 17 participation or act by the Snohomish County Defendants resulting in any constitutional
 18 violation. As a result, Plaintiffs’ claims for relief under 42 U.S.C. §1983 and §1988 against
 19 Defendants Fortney and Cummings should be dismissed with prejudice.

20
 21
 22 I certify this memorandum contains 1,263 words, in compliance with the Local Civil
 23 Rules.

1 DATED this 9th day of June, 2023.

2 JASON J. CUMMINGS
3 Snohomish County Prosecuting Attorney

4 By: s/Lyndsey M. Downs
5 LYNDSEY M. DOWNS, WSBA #37453
6 MARGARET A. DUNCAN, WSBA #47876
7 Deputy Prosecuting Attorney
8 Snohomish County Prosecutor's Office
9 Civil Division
10 3000 Rockefeller Avenue, M/S 504
11 Everett, WA 98201
12 Ph: (425) 388-6330 / Fax: (425) 388-6333
13 Lyndsey.downs@co.snohomish.wa.us
14 Margaret.duncan@co.snohomish.wa.us
15 *Counsel for Defendants Adam Fortney and Jason*
16 *Cummings*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on June 9, 2023, I caused to be served a true and correct copy of the foregoing document upon the parties listed by the method(s) indicated:

Joel B. Ard
Ard Law Group, PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
Joel@Ard.law
Attorney for Plaintiffs

☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. Mail
☐ Hand Delivery
☐ Messenger Service

Andrew R.W. Hughes
Andrew.hughes@atg.wa.gov
Kristin Beneski
Kristin.beneski@atg.wa.gov
R. July Simpson
July.simpson@atg.wa.gov
William McGinty
William.mcginity@atg.wa.gov
Assistant Attorney Generals
For Bob Ferguson and John R. Batiste

☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. Mail
☐ Hand Delivery
☐ Messenger Service

Christine M. Palmer
Senior Deputy Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
Cmpalmer@kitsap.gov
Attorney for Defendants
Chad M. Enright and John Gese

☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. Mail
☐ Hand Delivery
☐ Messenger Service

Kai A. Smith
 Meha Goyal
 Zachary J. Pekelis
 Pacifica Law Group LLP
 1191 Second Avenue, Suite 2000
 Seattle, WA 98101
Kai.smith@pacificallawgroup.com
Meha.goyal@pacificallawgroup.com
Zach.pekelis@pacificallawgroup.com
*Attorneys for Proposed Intervenor-
 Defendant Alliance for Gun Responsibility*

- ☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. Mail
☐ Hand Delivery
☐ Messenger Service

Derek A. Lee
 Angus Lee Law Firm, PLLC
 9105A NE Hwy 99, Suite 200
 Vancouver, WA 98665
angus@angusleelaw.com
*For Amici Curiae Washington Gun Rights
 and American Firearms Association*

- ☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. Mail
☐ Hand Delivery
☐ Messenger Service

Leslie A. Lopez
 Amanda M. Migchelbrink
 Clark County Prosecutor's Office
 P.O. Box 5000
 Vancouver, WA 98666-5000
Leslie.lopez@clark.wa.gov
Amanda.migchelbrink@clark.wa.gov
*Attorneys for Defendants
 John Horch and Tony Golik*

- ☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. Mail
☐ Hand Delivery
☐ Messenger Service

Christopher Horner
 Civil Deputy Prosecuting Attorney
 Kittitas County, Washington
 205 West Fifth
 Ellensburg, WA 98926
Christopher.horner@co.kittitas.wa.us
*Attorney for Defendants
 Greg Zempel and Clayton Myers*

- ☒ Electronic Filing (CM/ECF)
☐ Email
☐ U.S. First Class Mail
☐ Hand Delivery
☐ Messenger Service

1
2 I declare under the penalty of perjury of the laws of the State of Washington the
3 foregoing is true and correct to the best of my knowledge.

4 DATED this 9th day of June, 2023.

5
6 *s/Nikki Michel*
7 Nikki Michel, Legal Assistant
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27